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William H. Rodgers, Jr.
University of Washington School of Law

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A Hard Look at *Vermont Yankee*: Environmental Law Under Close Scrutiny

WILLIAM H. RODGERS, JR.*

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. the Supreme Court unanimously reversed the District of Columbia Circuit in two cases that closely scrutinized decisions of the Nuclear Regulatory Commission and, in so doing, questioned settled habits of judicial review of administrative action affecting the environment. In this article Professor Rodgers analyzes four implications of Vermont Yankee—substantive judicial review under the National Environmental Policy Act, judicial imposition of procedures upon agencies beyond the statutory minima of the Administrative Procedure Act, the obligation of the agencies to consider alternatives in the environmental impact statement without regard to the initiative of the parties, and the scope of alternatives properly addressed in the impact statement. Professor Rodgers concludes that Vermont Yankee is out of step with the dominant strains of the close scrutiny doctrine and, for this reason, suggests that the decision is likely to be isolated and confined.

Of the many bolts from the blue delivered by the Supreme Court last Term, one in particular has riveted the attention of those who follow that specialized body of administrative principles called environmental law.¹ In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*² the

*Professor of Law, Georgetown University Law Center. B.A. 1961, Harvard University; LL.B. 1965, Columbia University. This article is an elaboration of remarks presented to the Judicial Conference of the District of Columbia Circuit on May 23, 1978.

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1. Commentary on *Vermont Yankee* in the Supreme Court and lower courts includes Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978); Note, *The National Environmental Policy Act of 1969 and Nuclear Power Plant Licensing: Judicial Modification of Agency Rulemaking—Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 26 DE PAUL L. REV. 666 (1977); Comment, *Implementing the National Environmental Policy Act Through Rulemaking: The Implications of Natural Defense Council, Inc. v. Nuclear Regulatory Commission*, 126 U. PA. L. REV. 148 (1977); Comment, *Judicial Review of Generic Rulemaking: The Experience of the Nuclear Regulatory Commission*, 65 GEO. L.J. 1295 (1977). On the administrative procedures involved in nuclear power plant licensing, see Note, *The Use of Generic Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 VA. L. REV. 869 (1975); Comment, *AEC Rulemaking and Public Participation*, 62 GEO. L.J. 1737 (1974). On the general subject of environmental law, see W. RODGERS, ENVIRONMENTAL LAW (1977).

2. 435 U.S. 519 (1978).

Court, in a unanimous opinion³ written by Mr. Justice Rehnquist, reversed the United States Court of Appeals for the District of Columbia Circuit in two cases that closely scrutinized decisions of the Nuclear Regulatory Commission. The lower court decisions invalidated the grant of nuclear power plant licenses because of the Commission's failure to weigh and document environmental effects. In one, the lower court's remand to the agency was grounded chiefly on a perceived failure to consider fully the energy conservation alternative to Consumers Power Company's nuclear reactors.⁴ In the other, the remand was thought to be in order because the agency inadequately considered in a rulemaking and a licensing proceeding involving Vermont Yankee Nuclear Power Corporation the environmental effect of fuel reprocessing and disposal.⁵

In reversing, the Supreme Court delivered a sharp rebuke to the rationales of the decisions below, and seized upon the occasion to question settled habits of judicial review of administrative action affecting the environment. The Court recognized that under the National Environmental Policy Act (NEPA) the environmental impact of spent nuclear fuel processes was a proper subject of consideration by the Commission when licensing nuclear reactors.⁶ But the Court disapproved of the decision below in the *Vermont Yankee* case, which invalidated the Commission's spent fuel cycle rule because of procedural deficiencies.⁷ The Court stated:

[N]othing in the [Administrative Procedure Act], NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case.⁸

Next, the Supreme Court aligned itself with prior authority⁹ recognizing that the range of alternatives considered in an environmental impact statement (EIS) "must be bounded by some notion of feasibility."¹⁰ The Court thus held that the Commission properly declined to investigate the energy conservation alternative because the intervenors in the *Consumers Power* case had failed to make a showing " 'sufficient to require reasonable minds to inquire further.' "¹¹ The Court explicitly repudiated the lower court's view that the Commission's threshold test placed heavy substantive burdens on inter-

3. Mr. Justice Blackmun and Mr. Justice Powell did not take part in the consideration or decision of these cases. *Id.* at 558.

4. *Aeschliman v. NRC*, 547 F.2d 622, 629-30 (D.C. Cir. 1976).

5. *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 655 (D.C. Cir. 1976).

6. 435 U.S. at 539.

7. *Id.* at 540-41.

8. *Id.* at 548.

9. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972).

10. 435 U.S. at 551.

11. *Id.* at 554 (quoting *Consumers Power Co.*, 7 A.E.C. 19, 32 n.27 (1974)).

venors,¹² and condemned aspects of the decision below as "Kafkaesque"¹³ and "judicial intervention run riot."¹⁴ The Supreme Court expressed its umbrage in a peroration that included these observations:

Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function. NEPA does set forth significant substantive goals of the Nation, but its mandate to the agencies is essentially procedural.¹⁵

This article addresses four of the many provocative implications of *Vermont Yankee*: (1) substantive judicial review under NEPA; (2) judicial imposition of procedures upon agencies beyond the statutory minima of the Administrative Procedure Act; (3) the obligation of the agencies to consider alternatives in the environmental impact statement without regard to the initiative of the parties; and (4) the scope of alternatives properly addressed in the EIS. This analysis of *Vermont Yankee* will be prefaced by a discussion of various institutional techniques and doctrines that assure greater accountability in administrative decisionmaking. Prominent among these is the hard look doctrine of judicial review to which the agencies must answer in their environmental judgments.

ADMINISTRATIVE ACCOUNTABILITY AND THE HARD LOOK DOCTRINE

Stepping back for the moment from the specifics of *Vermont Yankee*, it seems clear that we live in an age of hostility to the administrative process. The current resident of the White House waged his successful presidential campaign against the faceless bureaucrat and his mindless organization charts.¹⁶ Being alien to the federal government, we are told, is an important ingredient of electoral success.¹⁷ Red tape is the subject of organized attack.¹⁸

12. *Id.*; see *Aeschliman v. NRC*, 547 F.2d 622, 627 & n.11 (D.C. Cir. 1976).

13. 435 U.S. at 557.

14. *Id.* (quoting Brief for Petitioner Consumers Power at 37).

15. *Id.* at 557-58.

16. See Havemann, *And Now for Something Completely Different*, 8 NAT'L J. 1585, 1586 (1976) (theme that federal bureaucracy was "a mess" was hammered home successfully in Carter presidential campaign).

17. See Bonafede, *Carter's Long Journey Ends in Victory on a Long Night*, 8 NAT'L J. 1582, 1582-83 (1978) (anti-Washington populist campaign contributed to Carter victory).

18. See SENATE SELECT COMM. ON SMALL BUSINESS, THE FEDERAL PAPERWORK BURDEN, S. REP. NO. 125, 93d Cong., 1st Sess. 2-3 (1973) (federal red tape reaching crisis proportions in terms of costs of compliance with reporting requirements and growing citizen distrust of government); President's Memorandum for Heads of Executive Dep'ts and Agencies, Reduction in Reports Required of the American Public, 13 WEEKLY COMP. OF PRES. DOC. 212 (Feb. 16, 1977) (requiring agency or department

The deregulators are riding high.¹⁹ The media and the public feast on bureaucratic gaffes highlighted in memos of the month²⁰ and golden fleece awards.²¹ Last summer, Californians voted to stop paying the bills,²² a rather clear indicator of dissatisfaction with services rendered.

Discontent about administrative performance brings retaliation aimed at enforcing increased accountability and curtailing excesses. Not all of these gestures are successful, of course, although some probably are.²³ Revival of the delegation doctrine has been suggested as a means for reasserting a degree of control over the unencumbered meanderings of administrative decision-makers.²⁴ The theory receives occasional support in the state courts in natural resources and environmental cases,²⁵ and the policies behind it are reflected in

heads to determine how their reports can be simplified or eliminated). See generally *The Federal Paperwork Burden: Hearings Before The Subcomm. on Gov't Regulation of the Senate Select Comm. on Small Business*, Part 6, 93d Cong., 2d Sess. (1974), Part 5, 93d Cong., 1st Sess. (1973), Part 1, 92d Cong., 2d Sess. (1972).

19. See, e.g., MacAvoy, *The Outlook for Regulation*, 45 ANTITRUST L.J. 186, 186 (1976) (regulatory reform fashionable across country and enjoys bipartisan support); Shenefield, *Regulation and Deregulation—Where Do We Stand*, 45 ANTITRUST L.J. 244, 246-47 (1976) (inflation, fuel shortages, and reduction in quantity and quality of services causes dissatisfaction with regulated economy). But see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1689-93 (1975) (natural monopolies and broadcasting require regulation; while transportation deregulation ideal, opposition from benefactors of status quo may dictate "second best" solution of merely lessening degree of administrative control).

20. Featured in the *Washington Monthly*.

21. Featured in Press Releases of Senator William Proxmire. See Nelson, *The Senator's Golden Egg*, Wash. Post, Sept. 24, 1978, Magazine at 20; Satchell, *The Award No One Wants*, Parade, July 9, 1978, at 14.

22. The reference, of course, is to the vote on Proposition 13. See CAL. CONST. art. XIII A (initiative enacted by voters in June 1978; limits property assessment and taxing powers of state and local governments); *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208 583 P.2d 1283, 1301-02, 149 Cal. Rptr. 239, 259 (1978) (upholding article XIII A as constitutional).

23. An almost certain failure, because of the immensity of its target, will be President Carter's campaign to require agency regulations to be written in comprehensible English. See, e.g., Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978) (requiring simple, clear, and unburdensome regulations through advance public notice of regulations under consideration, approval by agency directors of significant regulations, and periodic review of existing regulations); President's Remarks and Question-and-Answer Session with Dep't of Labor Employees, 13 WEEKLY COMP. OF PRES. DOC. 161, 164-65 (Feb. 9, 1977) (promoting minimal, clear, and well-written regulations through individual accountability of Cabinet officers).

Indeed, the situation is so desperate that the New York legislature has decreed that consumer contracts be written in "plain English." N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1978-79). This is, unfortunately, a language infrequently taught in the public schools of the country, and rarely spoken or written in the law schools.

24. Wright, Book Review, 81 YALE L.J. 575, 582-87 (1972) (advocating revival of delegation doctrine to check unbounded administrative discretion; Congress should delegate power only with prospective guidelines and standards for agency to follow).

25. E.g., *Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3d 1, 11-15, 97 Cal. Rptr. 431, 437-40 (1971) (portion of statute permitting timber industry to regulate itself held unconstitutional because it contained no standards); *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1071 (Fla. Dist. Ct. App. 1977) (invalidating sections of statute delegating discretionary authority to state commission to designate parts of state "areas of critical concern"); *Humane Soc'y v. New Jersey State Fish & Game Council*, 129 N.J. Super. 239, 246-47, 322 A.2d 841, 845 (1974) (standards accompanying delegation to Fish and Game Council held sufficient so that delegation not unconstitutional); *Washington v. Crown Zellerbach Corp.*, No. C-1907, slip op. at 4 (Wash. Super. Ct., Pacific County, July 15, 1978) (declaring unconstitutional statute giving agency power to set conditions on instream construction projects because legislature did not specify standards or procedural safeguards).

firmly established theories such as the public trust doctrine.²⁶ At the federal level, however, despite its appeal, the delegation doctrine remains in full disrepute, with little chance of revival.²⁷

Congress in recent years has moved comprehensively to open up, and in the process improve, agency decisionmaking. Although few were aware of it at the time, enactment of the Freedom of Information Act has revolutionized discovery practice in administrative proceedings.²⁸ The Advisory Committee Act has had a similar, if less comprehensive, effect.²⁹ Sunshine³⁰ and sunset³¹ laws also are parts of the administrative environment that has brought outside scrutiny to bear upon agency judgments.

Perhaps most important, Congress now seeks to regain control lost through earlier legislative delegations by after-the-fact review mechanisms, such as reporting requirements,³² one-house vetoes,³³ and similar variations.³⁴ This legislative second guessing is subject to criticism, even serious constitu-

26. Recognizing that some natural resources are held in trust by government for public benefit, the public trust doctrine demands that a court "look with considerable skepticism" upon action restricting public use. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970). Only a direct and explicit legislative narrowing of the use of natural resources will be honored. See, e.g., *Robbins v. Department of Pub. Works*, 355 Mass. 328, 331, 244 N.E.2d 577, 580 (1969) (legislation should express both plan for new use and intent to forgo existing use). See generally W. RODGERS, *supra* note 1, § 2.16(b).

27. See *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976) (wide delegation to President to restrict imports that "threaten to impair national security" upheld as clearly sufficient to meet challenge under delegation doctrine).

28. See 5 U.S.C. § 552 (1976); Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 68-69 (1975).

29. See Advisory Committee Act, 5 U.S.C. app. § 10(b) (1976) (assuring public access to records that were made available to or prepared for advisory committees).

30. See 5 U.S.C. § 552b (1976); Memorandum from the President for Heads of Departments and Agencies on Government in the Sunshine Act, 14 WEEKLY COMP. OF PRES. DOC. 1068, 1068 (June 9, 1978) (instructing agencies not to close meetings or defend closed meetings without strong justification).

31. See, e.g., COLO. REV. STAT. § 24-34-104 (Supp. 1976) (legislature must periodically audit and hold public hearings on each state agency before deciding whether to terminate, continue, or reestablish agency); TEXAS REV. CIV. STAT. ANN. art. 5429K (Vernon Supp. 1978) (advisory commission must annually review certain state agencies and recommend to Governor and legislature abolition, continuation, or reorganization of each agency); SENATE COMM. ON RULES AND ADMINISTRATION, THE PROGRAM REAUTHORIZATION AND EVALUATION ACT OF 1978, S. REP. NO. 981, 95th Cong., 2d Sess. (1978) (proposal for federal sunset law).

32. E.g., 7 U.S.C. § 136w(a)(3) (1976) (requiring advance notice to agricultural committees of proposed and final EPA regulations affecting pesticide use); Federal Land Policy and Management Act of 1976, § 204(a), 43 U.S.C.A. § 1714(c)(2) (West Supp. 1978) (requiring detailed explanation to relevant committees of private use of large plots of federal land affected by withdrawal orders, including environmental impact and list of alternatives).

33. See *Atkins v. United States*, 556 F.2d 1028, 1063 (Ct. Cl. 1977) (en banc) (per curiam) (plurality opinion) (majority of court upheld one-house veto in Federal Salary Act of 1967 against constitutional attack), cert. denied, 434 U.S. 1009 (1978). See generally Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1133-62 (1977).

34. See, e.g., Alaska Natural Gas Transportation Act of 1976, § 10(c)(3), 15 U.S.C. § 719h(c)(3) (1976) (congressional approval of President's choice of route for the Alaska gas pipeline conclusive as to the legal and factual sufficiency of President's environmental impact statement); Nuclear Nonproliferation Act of 1978, § 304(b), (c), Pub. L. No. 95-242, 92 Stat. 134 (1978) (to be codified in 42 U.S.C. § 2154(b),(c)) (executive order authorizing expedited NRC export license subject to congressional disapproval).

tional objection,³⁵ as a poor substitute for writing legislation with intelligible guidelines in the first place. But the growth of the practice is encouraged by strong currents. Congress is at its best as a counterpuncher—delegating authority, then lying in wait as constituent anguish brings into focus administrative overreaching. The one-house veto variations add bite to the traditional bark of oversight, and are fast becoming acceptable legislative staples along with the reactive amendment and familiar controls over appropriations. It is unlikely that a constitutional system that scarcely blinks at unconscionably broad delegations³⁶ should find intolerable these piecemeal legislative attempts to give belated direction to the executive.³⁷

In the courts, far and away the most important expression of the movement to reassert systematic control over agency decisionmaking is called the hard look doctrine of judicial review. This doctrine has been initiated by the judiciary, principally in the review of notice and comment rulemaking commonly undertaken in environmental and health and safety regulation. Its place of origin is the United States Court of Appeals for the District of Columbia,³⁸ although several of its strongest expressions have appeared elsewhere.³⁹ It has been embraced and refurbished by the Congress.⁴⁰ It goes by many names—"substantial inquiry,"⁴¹ "close scrutiny,"⁴² and now the "hard look" according to the Supreme Court's 1976 decision in the *Northern Great Plains Coal Case*.⁴³ Every noteworthy phenomenon can use a label; the

35. See President's Message to Congress on Legislative Vetoes, 14 WEEKLY COMP. OF PRES. DOC. 1146, 1147 (June 26, 1978) (legislative vetoes injecting Congress into details of administering substantive programs and laws infringe on executive's constitutional duty); Bruff & Gellhorn, *supra* note 33, at 1372-75; McGowan, *supra* note 33, at 1149-62.

36. See note 27 *supra* and accompanying text.

37. Cf. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441 (1977) (upholding congressional authority over custodian of Nixon tapes through legislative vetoes and express directives).

38. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851, 859 (D.C. Cir. 1970) (Leventhal, J.) (court will uphold agency findings if satisfied agency took "hard look" at issues), *cert. denied*, 403 U.S. 923 (1971); *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir.) (Leventhal, J.) (same), *cert. denied*, 395 U.S. 979 (1969).

39. E.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (court must make "substantial inquiry" to determine whether Secretary considered all relevant facts and reasonably believed no feasible alternative highway routes existed); *E.I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976) (EPA must disclose grounds for rulemaking and fully explain its course of inquiry, analysis, and reasoning); *City of Davis v. Coleman*, 521 F.2d 661, 673, 676 (9th Cir. 1975) (agency decision that project will have no significant environmental consequences must be reasonable and based on agency's "best efforts"); *South Terminal Corp. v. EPA*, 504 F.2d 646, 655 (1st Cir. 1974) (court must make "searching and careful" inquiry into rationality of EPA's air quality plan); *Scenic Hudson Preservation Conference v. FPC (I)*, 354 F.2d 608, 620 (2d Cir. 1965) (court must determine whether FPC compiled complete record and considered all relevant facts); *accord*, *Ray v. Mason County Drain Comm'n*, 393 Mich. 294, 308-09, 224 N.W.2d 883, 889 (1975) (trial court must make detailed findings of fact in environmental cases); *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 331 (Minn. 1977) (en banc) (Yetka, J., concurring) (state environmental agency should act as independent arm of all citizens, generate evidence of its own, and consider all alternatives to proposed electric power line).

40. See notes 128-38 *infra* and accompanying text.

41. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

42. *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1363 (S.D. Tex. 1973), *rev'd and remanded sub nom. Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); W. RODGERS, *supra* note 1, § 4.12, at 468; *id.* § 8.7, at 882.

43. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (Powell, J.) (court's role to ensure agency has

hard look is as important to the judicial review of technological decisionmaking by administrators as the slam dunk is to professional basketball.

What are the essential ingredients of this hard look taken by the courts at agency rulemakings? For present purposes, there are three. First is the substantive component, under which the courts read closely the operative statute to make sure the agencies stay within the scope of discretion assigned by Congress.⁴⁴ Second is the procedural component, under which the courts have assumed a power to oversee the fairness of agency decisionmaking. In the pre-*Vermont Yankee* days, this posture was typified by Judge Leventhal's decision in *International Harvester*,⁴⁵ which was read and understood as inviting limited rights of cross-examination on "sensitive" subjects arising during notice and comment rulemaking.⁴⁶

Third, and most important, is the incessant demand of the hard look case law for reasoned decisionmaking. This occurs in cases in which the administrator typically acts within the bounds of permissible discretion of the governing statute, but does a poor job of explaining or justifying the results. In the parlance of the Administrative Procedure Act, judicial disapproval of agency rulemaking normally must rest upon the ground that the administrative action was "arbitrary [and] capricious."⁴⁷ Courts taking a hard look must

taken "hard look" at environmental consequences) (citing *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972) (Leventhal, J.) (court must ensure that agency has complied with congressional directive and taken "hard look" at environmental consequences)); see *Aberdeen & R.R.R. Co. v. SCRAP*, 422 U.S. 289, 327 n.28 (1975) (no need to resolve court's scope of review of EIS because ICC adequately gave "hard look"). *Kleppe* speaks of the agency taking a "hard look" at the problems before it. 427 U.S. at 410 n.21. Actually, courts take a hard look to make sure the agency has taken a hard look.

Judicial decisions regularly invoke a variety of hard look formulations while reviewing agency actions, especially in cases arising under the National Environmental Policy Act. *E.g.*, *Culpeper League for Environmental Protection v. NRC*, 574 F.2d 633, 634 (D.C. Cir. 1978) (per curiam) ("hard look"); *Nebraska v. Rural Electrification Administration*, 12 *Envir. Rep. Cas.* 1156, 1159 (D. Neb. 1978) ("hard look"); *Fund for Animals, Inc. v. Andrus*, 11 *Envir. Rep. Cas.* 2189, 2197 (D. Minn. 1978) ("in-depth probe of all circumstances"); *Citizen's Comm. for Environmental Protection v. United States Coast Guard*, 456 F. Supp. 101, 117 (D.N.J. 1978) ("substantial inquiry"); *Monarch Chem. Works, Inc. v. Exxon*, 452 F. Supp. 493, 496 (D. Neb. 1978) (court "feels compelled to examine the considerable evidence presented in detail"); *Chautauqua County Environmental Defense Council v. Adams*, 452 F. Supp. 376, 380 (W.D.N.Y. 1978) ("hard look"); *Chatauqua County Environmental Defense Council v. EPA*, 452 F. Supp. 69, 78 (D.N.J. 1978) ("thorough review"); *Sierra Club v. Bergland*, 451 F. Supp. 120, 128 (N.D. Miss. 1978) ("hard look"); *Mack v. Califano*, 447 F. Supp. 668, 670 (D.D.C. 1978) ("hard look"); *Maryland Nat'l Capitol Park & Planning Comm'n v. Martin*, 447 F. Supp. 350, 353 (D.D.C. 1978) ("hard look"); *City of New Haven v. Chandler*, 446 F. Supp. 925, 930 (D. Conn. 1978) ("hard look"); *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 478, 490 (D. Kan. 1978) ("searching" inquiry; "hard look").

44. See 5 U.S.C. § 706(2)(C) (1976) (requiring courts to hold unlawful and set aside agency action unauthorized by statute). Often, the label of substantive judicial review is used to describe the situation in which the agency action, although within the channels of authority granted by the legislature, is nonetheless arbitrary and capricious under 5 U.S.C. § 706(2)(A). See Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. REV. 498, 509-10 (1977) (review of agency action based on incomplete record called "limited substantive review"); note 86 *infra*.

45. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

46. *Id.* at 631; see *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 782 (D.C. Cir. 1976) (procedures beyond APA required in some circumstances); Williams, "Hybrid Rulemaking" Under the *Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 402-03 (1975).

47. 5 U.S.C. § 706(2)(A) (1976). Of course, the standard normally is whether the agency decision is supported by "substantial evidence" if the matter under review arose in the context of trial-type procedure. *Id.* § 706(2)(E). Most practitioners, and not a few academics, have difficulty understanding why the scope

become sufficiently acquainted with technical matters in the record to understand why the agency did what it did.⁴⁸ The administrator through the record must be in a position to explain to the court "the reasons why he chooses to follow one course rather than another."⁴⁹ Under the doctrine, assumptions must be spelled out, inconsistencies explained, methodologies disclosed, contradictory evidence rebutted, record references solidly grounded, guesswork eliminated and conclusions supported in a "manner capable of judicial understanding."⁵⁰

The hard look doctrine plays no favorites; it is advanced as enthusiastically by industry as it is by environmentalists.⁵¹ Its acceptance is deep. Its reach is broad. It is invoked to require disclosures—of the reliability of methodology,⁵² of documentation upon which the agency action was based,⁵³ of the standards applied or to be applied in reaching a decision,⁵⁴ of the form or scope of regulation contemplated.⁵⁵ It compels the agency to address key issues—the need for the level of regulation proposed,⁵⁶ the cost⁵⁷ and workability⁵⁸ of the technology required, potential health effects,⁵⁹ inconsis-

of review is theoretically broader for the litigant who at least had a full procedural opportunity to bring the agency around to his way of thinking. For a useful general analysis, see Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

48. See *South Terminal Corp. v. EPA*, 504 F.2d 646, 666-67 (1st Cir. 1974) (court would abdicate its function if it did not carefully review agency's key technical determinations).

49. *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974); see *Weyerhaeuser Co. v. Costle*, 11 Env'r. Rep. Cas. 2149, 2156-62 (D.C. Cir. 1978) (agency must explain standard chosen and validity of underlying data).

50. *E. I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1038 (4th Cir. 1976), *aff'd in part and rev'd in part*, 430 U.S. 112 (1977).

51. Many of the strongest statements of the doctrine have occurred in cases involving industry attacks upon agency rulemakings. See, e.g., *id.* at 1034, 1035, 1036, 1037, 1039 (chemical industry); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973) (cement industry), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 642 (D.C. Cir. 1973) (automobile industry); *Manufacturing Chemists Ass'n v. Costle*, 451 F. Supp. 902, 903-04 (W.D. La. 1978) (chemical industry).

52. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 642 (D.C. Cir. 1973) (EPA must show reliability of methodology it used to refute adverse industry data on air pollution control technology).

53. *Environmental Defense Fund, Inc. v. Blum*, 458 F.2d 650, 660 (D.D.C. 1978) (agency must disclose information received ex parte and used in informal rulemaking when the information bears directly on complex technical issues and probably will affect outcome); cf. *Texas v. EPA*, 499 F.2d 289, 307 & n.30, 308 & n.31 (5th Cir. 1971) (dictum) (court may in future require EPA to disclose documents showing how agency made certain calculations essential to its decision).

54. See *Ford Motor Co. v. EPA*, 567 F.2d 661, 671-72 (6th Cir. 1977) (agency must justify permit decision solely on published policy); *Environmental Defense Fund, Inc. v. Ruckelshaus (DDT II)*, 439 F.2d 584, 596-97 (D.C. Cir. 1971) (agency must disclose criteria used to grant or deny suspension of pesticide registration).

55. See *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1251 & n.39 (D.C. Cir. 1973) (agency must give sufficient notice of the regulation proposed; impermissible to promulgate rule establishing specific costs after notice informed parties only that general policy of allocating costs would be considered).

56. See *South Terminal Corp. v. EPA*, 504 F.2d 646, 671 (1st Cir. 1974) (agency required to show that level of air pollution in Boston justifies proposed parking freeze).

57. See *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 634 (2d Cir. 1976) (agency's failure to consider costs unreasonable).

58. *Id.* (agency's failure to consider feasibility unreasonable).

59. See *Environmental Defense Fund, Inc. v. EPA (Aldrin-Dieldrin I)*, 465 F.2d 528, 538 (D.C. Cir. 1972) (agency must explain its decision not to ban immediately known carcinogen as imminent health hazard).

ent applications of data.⁶⁰ It can mandate specific actions—a retracing of the regulatory steps if the method of calculation is defective and the data relied upon outdated,⁶¹ a rewriting of vague and hortatory guidelines to make them specific,⁶² a fashioning of exemptions to deal with hardship cases.⁶³ The doctrine shows no signs of abatement. Recently, courts have held that agencies must give notice and provide an opportunity to submit data on the threshold question of whether to prepare an impact statement,⁶⁴ must respond on the merits to plaintiffs' contentions,⁶⁵ must reconsider regulations and report to the court in light of new data,⁶⁶ and must allow cross-examination on complex and crucial issues of technological feasibility.⁶⁷

A noteworthy aspect of the hard look doctrine is that the response of the agency, and later of the courts, is influenced importantly by the force and detail of the presentations of counsel. Industriousness is rewarded, competence served. Detailed comments on the evidence must be answered;⁶⁸ technical comments and studies that are proffered addressed;⁶⁹ and doubts raised about methodology responded to.⁷⁰ In general, the agency must answer serious questions fairly raised.

In pursuing this tack, reviewing courts have not hesitated to go beyond the limited standards of articulation and justification found in the Administrative Procedure Act. Ordinarily, the APA itself calls only for a "concise general

60. See *American Meat Inst. v. EPA*, 526 F.2d 442, 459 (7th Cir. 1975) (agency required to justify departure from otherwise consistent use of two sets of data).

61. See *CPC Int'l, Inc. v. Train*, 515 F.2d 1032, 1051 (8th Cir. 1975) (agency told to calculate new plant costs separately from existing plant costs and to use most current and relevant data).

62. See *FMC Corp. v. Train*, 539 F.2d 973, 982 (4th Cir. 1976) (court required more specifics when agency guidelines contained only vague references to elimination of leaks and spills and thus gave insufficient guidance in construction of new plants).

63. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 641 (1973) (when economic hardship outweighed environmental benefit from enforcement of statute, court suggested EPA may fashion interim relief short of suspension of emission standards).

64. *Cross-Sound Ferry Servs., Inc. v. United States*, 573 F.2d 725, 731 (2d Cir. 1978); *accord*, *Hanly v. Kleindienst* (II), 471 F.2d 823, 830-31 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

65. See *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327, 343 (D.D.C. 1978) (agency must respond to petitioner's challenge to agency's design criteria).

66. See *Environmental Defense Fund, Inc. v. Costle*, 578 F.2d 337, 346 (D.C. Cir. 1978) (in light of rapidly developing data on inorganic contaminants, EPA must report to court on new data bearing on safe drinking water regulations).

67. See *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1305 (9th Cir. 1977) (industry must be allowed to cross-examine EPA experts on crucial issue of technical feasibility of sulfur controls).

68. See, e.g., *id.* at 1299 (EPA must respond with detailed expert testimony of its own when industry presents expert testimony rebutting agency's initial determination of technical feasibility); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973) (agency must respond to industry's claim of inaccurate data due to faulty sampling techniques), *cert. denied*, 417 U.S. 921 (1974).

69. See, e.g., *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 436-37 (D.C. Cir. 1973) (industry test results show sufficiency of agency's standard), *cert. denied*, 415 U.S. 969 (1974); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-94 (D.C. Cir. 1973) (agency must respond to detailed technical and mathematical comments challenging its methodology), *cert. denied*, 417 U.S. 921 (1974).

70. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973) (detailed comments on methodology that meet threshold materiality requirement must be answered by agency), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 642 (D.C. Cir. 1973) (EPA must demonstrate reliability of methodology used to overcome manufacturers' showing of lack of available technology).

statement" of the "basis and purpose" of agency rules.⁷¹ The courts have demanded more than these "minimum requirements." This course is perhaps best illustrated by *Kennecott Copper Corp. v. Environmental Protection Agency*,⁷² in which the court went beyond the APA minima to remand for an additional explanation of how the agency derived its secondary ambient air standard for sulfur oxides.⁷³ Similar explanations are now a routine feature of EPA decisionmaking,⁷⁴ not likely to be discarded in the wake of *Vermont Yankee*.

The National Environmental Policy Act, properly viewed, is a comprehensive statutory elaboration elevating the hard look to a penetrating autopsy in NEPA cases. The heart of the matter, of course, is the impact statement process of section 102(2)(C), which combines "the legislative objectives of full disclosure, consultation, and reasoned decisionmaking prescribed as the cutting edge of administrative reform."⁷⁵ The environmental impact statement provision can be viewed as an elaborate and specialized findings requirement that far outdistances the minimal explanation of a rule's "basis and purpose" under the APA.⁷⁶

In the demanding world of the hard look, *Vermont Yankee*'s cursory glance seems strikingly out of step. Upon analysis, it is safe to predict that the decision will be sharply contained.⁷⁷ *Vermont Yankee* may well follow the Supreme Court's initial utterances on NEPA in *Aberdeen and Rockfish Railroad v. Students Challenging Regulatory Agency Procedures*,⁷⁸ which for various reasons has had about as much practical impact as the unreported decisions of the Superior Court of Okanogon County, State of Washington.⁷⁹ The limited prospects for *Vermont Yankee* stem not so much from the foolishness of the ruling or the rambunctiousness of the lower federal courts but rather from the realities of current environmental law practice. Notably, recent statutes on many subjects have explicitly adopted hard look assumptions,⁸⁰ which have gone beyond the point of repudiation. And even the utterances of the highest court must find a way of making peace with how the world works, particularly when that reality is fueled by a deeply felt conviction by litigants, lower courts, and Congress that administrative procedures could do better.

71. 5 U.S.C. § 553(c) (1976).

72. 462 F.2d 846 (D.C. Cir. 1972).

73. *Id.* at 850; see *Udall v. FPC*, 387 U.S. 428, 450-51 (1967) (agency must explore further public interest in private development of hydroelectric plant).

74. See Gaines, *Decisionmaking Procedures at the Environmental Protection Agency*, 62 IOWA L. REV. 839, 899 (1977) (courts require EPA to show that it has included all pertinent information).

75. *Sierra Club v. Adams*, 578 F.2d 389, 393 (D.C. Cir. 1978) (quoting W. RODGERS, *supra* note 1, § 7.4, at 725).

76. On the importance of a detailed statement of reasons, see Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1292 (1972).

77. The erosion of *Vermont Yankee* may already be underway. In *Cincinnati Gas & Elec. Co. v. EPA*, 578 F.2d 660 (6th Cir. 1978), the court cited *Vermont Yankee* but simultaneously applied hard look principles to disapprove the agency's modeling assumptions. *Id.* at 663.

78. 422 U.S. 289 (1975).

79. One of these is a turgid statement of facts that resists advances by all but the most determined.

80. See notes 127-38 *infra* and accompanying text.

FOUR IMPLICATIONS OF *Vermont Yankee*

I. SUBSTANTIVE JUDICIAL REVIEW UNDER NEPA

Almost in passing, Mr. Justice Rehnquist's opinion for the Court in *Vermont Yankee* observes that "NEPA does set forth significant substantive goals for the nation, but its mandate to the agencies is essentially procedural."⁸¹ To be sure, NEPA's substantive aims do have a momentous ring—assuring safe and healthy surroundings, preserving natural aspects of our national heritage, and approaching the maximum attainable recycling of depletable resources. All of these substantive goals—and others—are quite clearly expressed in section 101(b) of NEPA.⁸²

The Court, quite properly, found no occasion for considering the next question, which is not whether these goals are significant, but whether the courts have any way of enforcing them, particularly when reviewing agency actions. This is another issue, and a closer one. Eight courts of appeals that have considered it, however, have reached the conclusion that NEPA grants a limited authority to the judiciary to modify or nullify agency action found offensive to the substantive goals of the Act.⁸³ This conclusion is consistent

81. 435 U.S. at 558.

82. 42 U.S.C. § 4331(b) (1976). The section reads:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

83. See *Jackson County v. Jones*, 571 F.2d 1004, 1013 (8th Cir. 1978) (courts have obligation under NEPA to review agency decisions on the merits) (quoting *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 298-300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973)); *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (dictum) (NEPA requires cost-benefit analysis) (quoting *Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 516 F.2d 378, 386 (2d Cir. 1975)), *cert. denied*, 434 U.S. 1064 (1978); *Environmental Defense Fund, Inc. v. Corps of Eng'rs (Tennessee-Tombigbee)*, 492 F.2d 1123, 1139-40 (5th Cir. 1974) (dictum) (NEPA permits limited substantive review of agency decision); *Sierra Club v. Froehlke (Kickapoo River)*, 486 F.2d 946, 953 (7th Cir. 1973) (agency's decision subject to limited substantive review under NEPA); *Silva v. Lynn*, 482 F.2d 1282, 1284 (1st Cir. 1973) (detailed statement in EIS allows court to determine whether agency has made a good faith effort to consider the values NEPA is intended to vindicate); *Conservation Council of North Carolina v. Froehlke (I)*, 473 F.2d 664, 665 (4th Cir. 1973) (per curiam) (court should conduct limited review to determine whether agency reached its decision after good faith consideration of substantive goals of NEPA); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (dictum) (under NEPA

with the practice of the Nuclear Regulatory Commission itself which, after several years' experience in implementing *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*,⁸⁴ undertakes a NEPA-inspired cost-benefit analysis in its individual licensing decisions.⁸⁵ It is also consistent with the standards of review in the APA, which are quite clearly substantive in that they permit the courts to strike down unsupported and arbitrary and capricious actions.⁸⁶ The courts would have little difficulty in disapproving on the merits, let us say, the issuance of a license to transport radioactive materials to the Red Brigade, or the adoption of a rule endorsing the use of lower Manhattan as a spent fuel disposal area.

The case for a limited substantive review under NEPA has been fully argued elsewhere.⁸⁷ Suffice it to say that the broad pronouncements of section 101, despite a notable lack of precision, do not appear to be so bereft of meaning as to represent a legislative commitment of the matters to the unreviewable discretion of the agencies.⁸⁸

Nevertheless, the Supreme Court's ultimate answer to the question of NEPA substantive review is likely to be wholly inconsequential. Substantive NEPA is a fighting issue, but not one that decides many cases.⁸⁹ One reason is that even though NEPA is "essentially procedural,"⁹⁰ the procedural decisions have had a way of working substantive modifications of agency actions.⁹¹ More important is that NEPA litigation with substantive aims rarely proceeds without the supporting presence of complementary federal

court may review agency decision on merits if balance of costs and benefits was arbitrary or environmental values in NEPA § 101 were given insufficient weight); *Environmental Defense Fund, Inc. v. TVA*, 371 F. Supp. 1004, 1014 (E.D. Tenn. 1973) (NEPA permits courts to scrutinize agency's balance of costs and benefits), *aff'd per curiam*, 492 F.2d 466 (6th Cir. 1974). *But see* *Lathan v. Brinegar* (II), 506 F.2d 677, 692-93 (9th Cir. 1974) (acknowledging substantive review only under the APA, 5 U.S.C. § 706(2)(A), because NEPA is essentially procedural).

84. 449 F.2d 1109, 1113-14 (D.C. Cir. 1971) (AEC required to provide detailed statement to ensure that the balancing of costs and benefits mandated by NEPA has been undertaken).

85. See 10 C.F.R. §§ 51.20(b), 51.52(c) (1978); Trubek, *Allocating the Burden of Environmental Uncertainty: The NRC Interprets NEPA's Substantive Mandate*, 1977 WIS. L. REV. 747, 755-56 (discussing NRC rules governing license applications).

86. 5 U.S.C. § 706(2)(A) (1976); see *Lathan v. Brinegar* (II), 506 F.2d 677, 692-93 (9th Cir. 1974) (section 706(2)(A) may permit substantive review of agency environmental action). There are differences, of course, between substantive judicial review under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A) (1976) and under the excess of statutory right standard of 5 U.S.C. § 706(2)(C) (1976). See note 44 *supra*.

87. E.g., W. RODGERS, *supra* note 1, § 7.5; Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 238, 304-11 (E. Dolgin & T. Guilbert eds. 1974); Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. INDUS. & COM. L. REV. 685 (1972); Robie, *Recognition of Substantive Rights Under NEPA*, 7 NAT. RESOURCES L. 386, 423-36 (1974); Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 S.D. L. REV. 279, 285-94 (1974); Note, *The Least Adverse Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735, 756-58 (1975).

88. Cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (action is committed to agency discretion under 5 U.S.C. § 701 only when there is no law to apply).

89. This is stated with conviction, as I have been attempting to find one for inclusion in my casebook, W. RODGERS, *CASES AND MATERIALS ON ENERGY & NATURAL RESOURCES LAW* (1979).

90. 435 U.S. at 558.

91. See COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS' EXPERIENCE BY SEVENTY FEDERAL AGENCIES* 21-25, D-1 to D-4 (1976).

legislation supplying an unmistakable substantive component. The Tellico Dam ran into trouble not because of NEPA but because of section 7 of the Endangered Species Act.⁹² The oil and gas lease sale in the George's Bank area was frustrated not so much by NEPA but by the Outer Continental Shelf Lands Act.⁹³ The injunction in the tuna fishing case rested not upon NEPA but upon the Marine Mammal Protection Act.⁹⁴

Substantive judicial review of agency decisions on environmental and technical issues is widespread, even without NEPA. The courts regularly draw lines defining the agencies' authority. The result is a brisk decision on the merits. The disappointed can seek relief in the Congress. This is what happened in the Alaska pipeline litigation,⁹⁵ and in the anticlearcutting decisions under the National Forest Organic Act of 1897.⁹⁶ Within the last year, a partial listing of substantive decisions on environmental issues by federal appellate courts includes holdings that section 111 of the Clean Air Act forbids the exemption of modified facilities from the new source performance rules,⁹⁷ that motor oil is not "fuel" within the meaning of section 211 of the Clean Air Act,⁹⁸ that standards under section 17 of the Noise Control Act must be issued for all "equipment and facilities" of the railroads,⁹⁹ that work practice standards are not "emission standards" under

92. See *TVA v. Hill*, 437 U.S. 153, 191-95 (1978) (applying 16 U.S.C. § 1536) (halting construction of dam that threatened endangered species). See also W. RODGERS, *supra* note 1, § 7.12, at 828-29 (discussing Endangered Species Act as complementary to NEPA).

93. See *Massachusetts v. Andrus*, 11 Env. Rep. Cas. 1138, 1141-42 (D. Mass.), *stay denied*, 8 Env. L. Rep. 20,192 (1st Cir. 1978) (Outer Continental Shelf Lands Act requires Interior secretary to preserve character of sea, navigation and fishing over continental shelf).

94. See *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 313-14 (D.D.C.) (applying 16 U.S.C. § 1361) (incidental killing of porpoises enjoined until Secretary determined that killings were consistent with purposes of Marine Mammal Protection Act), *injunction stayed*, 540 F.2d 1141 (D.C. Cir. 1976).

95. See *Wilderness Soc'y v. Morton*, 479 F.2d 842, 891-93 (D.C. Cir.) (applying Mineral Leasing Act of 1920, § 28, 41 Stat. 449) (enjoining Interior Secretary from issuing special land use permit granting rights of way for pipeline construction), *cert. denied*, 411 U.S. 917 (1973). The court's decision was overruled legislatively by 1973 amendments to the Mineral Leasing Act. See 30 U.S.C. § 185 (1976) (giving Secretary discretion to grant right of way).

96. See *West Virginia Div. of the Izaak Walton League v. Butz*, 522 F.2d 945, 948 (4th Cir. 1975) (applying Organic Act of 1897, 16 U.S.C. § 476 (1970)) (enjoining Forest Service from allowing clearcutting of national forests because plain language of statute permitted cutting only of individually marked dead or mature trees); *Zieske v. Butz*, 406 F. Supp. 258, 259-60 (D. Alaska 1975) (same), *aff'd on rehearing*, 412 F. Supp. 1403, 1405-06 (D. Alaska 1976); cf. *Miller v. Mallery*, 410 F. Supp. 1283, 1296 & n.11. (D. Ore. 1976) (applying Bull Run Trespass Act, 33 Stat. 526) (enjoining Forest Service logging program on terms of statute but practically inviting appellate reversal or congressional repeal). The 1897 Act was repealed by the National Forest Management Act of 1976, § 13, Pub. L. No. 94-588, 90 Stat. 2958 (1976), and the Trespass Act was repealed by the Act of November 23, 1977, § 3(c), Pub. L. No. 95-200, 91 Stat. 1428 (1977).

97. See *ASARCO, Inc. v. EPA*, 578 F.2d 319, 329 (D.C. Cir. 1978) (Clean Air Act Amendments of 1970, § 111, 42 U.S.C. § 1857c-6 (1976)). EPA regulations had permitted an increase in pollution from one building within a large complex, as long as the pollution from the total complex did not increase, but the court held the agency's "bubble concept" contrary to the words and intent of the statute. *Id.* at 326-29.

98. See *Lubrizol Corp. v. EPA*, 562 F.2d 807, 818-19 (D.C. Cir. 1977) (Clean Air Act Amendments of 1970, § 211, 42 U.S.C. § 1857f-6c (1976)).

99. See *Association of Am. R.R.s. v. Costle*, 562 F.2d 1310, 1315 (D.C. Cir. 1977) (Noise Control Act of 1972, § 17, 42 U.S.C. § 4916 (1976)).

section 112 of the Clean Air Act,¹⁰⁰ and that agency action having socioeconomic consequences alone does not produce a significant impact on the "quality of the human environment" under NEPA.¹⁰¹

Predicting the likelihood of substantive judicial review under environmental statutes is mostly a matter of assessing the prospects of an administrative trespass into territory withdrawn by legislation. Obviously, these legislative mandates range from the hopelessly vague to the relentlessly specific, and include everything in between. The tighter the legislation, the finer the margin for administrative error, and the happier the prospects for judicial correction of mistakes; the broader the delegation, the more difficult it is to convince a court that the legislature did not mean to have one accept his administrative fate.¹⁰²

On this spectrum, NEPA is a statute imprecise in its mandates. Rarely can the administrator be charged credibly with pursuing a result the statute forbids. In this circumstance, or any other in which the administrator stays within the channels of the assigned authority, what remains of the hard look is the assurance of fair procedures and reasoned results. It is these features of the hard look doctrine that are put in jeopardy by *Vermont Yankee*.

II. JUDICIAL IMPOSITION OF PROCEDURES BEYOND THE STATUTORY MINIMA OF THE ADMINISTRATIVE PROCEDURE ACT

The *Vermont Yankee* decision is quite clear in its determination that in the absence of extremely compelling circumstances courts should refrain from

100. See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289 (1978) (Clean Air Act Amendments of 1970, § 112, 42 U.S.C. § 1857 (1976)).

101. See *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978) (National Environmental Protection Act of 1969, § 102, 42 U.S.C. § 4332 (1976)).

102. A few environmental statutes illustrate tightly drawn legislation that leads to close review of agency action. E.g., Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976) (assuring habitat preservation for every species brought within its protection); Colorado River Storage Project Act of 1956, 43 U.S.C. § 620 (1976) (making clear that water from Lake Powell impoundment should not enter the Rainbow Bridge National Monument) (held to have been repealed in relevant part in *Friends of the Earth v. Armstrong*, 485 F.2d 1, 6-7 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974)); Mineral Leasing Act of 1920, § 28, 41 Stat. 449 (delineating precise right-of-way width limitations for pipelines) (amended by Trans-Alaska Pipeline Authorization Act of 1973, 30 U.S.C. § 185 (1976)); National Forest Organic Act of 1897, ch. 2, § 1, 30 Stat. 35 (permitting the sale of "dead, matured or large growth of trees," so long as the trees to be sold were "marked and designated," and removed "under the supervision of a person appointed by the Secretary of Agriculture") (repealed 1976); accord, *Association for Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 242, 170 N.E. 902, 905 (1930) (applying "forever wild" provision of New York Constitution to void law authorizing construction of bobsleigh run that would have necessitated cutting trees on state land); *Helms v. Reid*, 90 Misc. 2d 583, 607-09, 394 N.Y. Supp. 2d 987, 1004-05 (Sup. Ct. 1977) (applying "forever wild" provision to uphold regulation precluding landing of seaplanes on lakes surrounded by Adirondack Park); cf. *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 198-99 (Me. 1978) (forest cleanup program held to violate "natural wild state" and "sanctuary for wild beasts and birds" language in deed of trust conveying parkland to state).

By contrast, agencies are allowed wide discretion under vague statutes. See, e.g., Multiple-Use and Sustained Yield Act of 1960, 16 U.S.C. § 531(a) (1976) (provisions lacking enforceable standards); Federal Power Act of 1920, § 10(a), 16 U.S.C. § 803(a) (1976) (inviting Federal Power Commission to license hydroelectric projects "best adapted" to a comprehensive plan); Atomic Energy Act of 1946, § 182, 42 U.S.C. § 2232 (1976) (inviting administrative decisionmaker to require information he may "deem necessary" to protect the "health and safety of the public").

directing the agencies to employ procedures beyond the minima of the APA.¹⁰³ In notice and comment rulemaking, these minima include statutory rights to be advised of the substance of the proposal, to comment upon it in writing, and to receive a "concise general statement" of the "basis and purpose" of the rule adopted.¹⁰⁴ This aspect of *Vermont Yankee* is likely to raise the ire of the practicing bar. The concern is that procedural rights, and the opportunities to probe agency decisionmaking, will be frozen in the 1946 APA model.¹⁰⁵ In particular, the limited rights of cross-examination recognized by *International Harvester* might evaporate¹⁰⁶ along with the requirements that administrators closely justify their decisions.¹⁰⁷ These are both crucial procedural components of the hard look doctrine.¹⁰⁸

The serious implications of *Vermont Yankee* for hard look procedures, nonetheless, are unlikely to materialize. In the first place, the Court probably killed a straw man of its own creation. Judge Bazelon's opinion for the court below specifically refrains from ordering the NRC to adopt a fixed agenda of procedures, and outlines the possibilities only by way of suggestion.¹⁰⁹ The opinion, however, is pregnant with the notion that the Commission's choice of procedures was inadequate to develop a record that would support the spent fuel cycle rule.¹¹⁰ Judge Bazelon also has made clear in other contexts that judicial review of technical agency decisions ought to concentrate on procedures, not the merits,¹¹¹ although he is not accused of committing reversible error in a law review article. The apparent mistake of the majority opinion of the court of appeals was in being a trifle too specific in suggesting how the remand might be handled.¹¹² The Supreme Court directs courts not to tell agencies how to conduct their rulemakings, which is rarely done by letter and verse anyhow. Even the renowned right of cross-examination recognized by *International Harvester* was advanced by the court only as a possibility in particular cases of need,¹¹³ and was not used upon remand.¹¹⁴

103. 435 U.S. at 543.

104. 5 U.S.C. § 553(c) (1976).

105. See Stewart, *supra* note 1, at 1811-20.

106. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631 (D.C. Cir. 1973) (dictum) (agency may be required to permit cross-examination on critical points where normal agency procedures would be inadequate).

107. See notes 48-70 *supra* and accompanying text.

108. See notes 45-50 *supra* and accompanying text.

109. *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 653-54 (D.C. Cir. 1976).

110. See *id.* at 643-46 (court must decide whether procedures adequate to ventilate the issue and whether adequate diversity of opinion was heard and considered); *id.* at 653 (court suggests but does not require procedures such as informal conferences, discovery, interrogatories, limited cross-examination, and funding of outside intervenors as a means for agency to develop a complete record).

111. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring); Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 822-23 (1977); Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 107 (1976).

112. See 435 U.S. at 541-42 ("The [circuit] court . . . refrained from actually ordering the agency to follow any specific procedures . . . but there is little doubt in our minds that the ineluctable mandate of the court's decision is that the procedures afforded during the hearings were inadequate.").

113. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631 (D.C. Cir. 1973).

114. Williams, *supra* note 46, at 443. A principal bone of contention between Professors Stewart and Byse appears to be the proper specificity of remand orders, a subject hardly worth scrapping over. Compare Stewart, *supra* note 1, at 1819 with Byse, *supra* note 1, at 1826-29. Ordinarily, the courts ought to refrain from instructing the agency on how to go about developing its record. It is but a small step for the court.

Thus, *Vermont Yankee* effectively forbids a narrow form of appellate directive that is almost never used, perhaps not even in the case under review.

Next, although the Court prohibits a reversal for procedural inadequacy, the justices approve a remand to determine "whether the challenged rule finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court."¹¹⁵ Judge Tamm, concurring below, thought it did not,¹¹⁶ and obviously neither did the majority.¹¹⁷ Thus, the rule went back to the Commission as insufficiently supported under the arbitrary and capricious standard and not because the Commission used faulty procedures. Next time, the rule could fail again as inadequately supported if the Commission were to bring back a record consisting chiefly of a twenty-page expression of confidence in the future, untested by cross-examination and unresponsive to serious concerns.¹¹⁸

Unfortunately, the potential mischief of *Vermont Yankee* will not be stilled by recognition that it forbids only a peculiar form of offensive overbearing in remand orders. *Vermont Yankee* very well may be read as discouraging remands to correct record weaknesses that are best improved by resort to specific procedural techniques, such as disclosure or cross-examination. The decision thus is likely to take the impetus out of the agencies' innovative use of procedures beyond the statutory minima.¹¹⁹ It also may preclude the discov-

however, to suggest a resort to hybrid procedures thought likely to produce an adequate record on remand. The argument of judicial overreaching, articulated in *Vermont Yankee*, ignores the largely constructive role courts have played in the development and acceptance of hybrid procedures by the agencies. See Stewart, *supra*, at 1819 & n.60, 1820.

115. 435 U.S. at 549. But see Friendly, *supra* note 76, at 1314 (practical result nearly the same whether rule invalidated because not based on substantial evidence or because additional procedures required).

116. Natural Resources Defense Council, Inc. v. NRC, 547 F.2d 633, 658-59 (D.C. Cir. 1976) (Tamm, J., concurring).

117. See *id.* at 647-52.

118. The rule reviewed in *Vermont Yankee* was flimsily supported, resting on little more than Dr. Pittman's confident assertions that the disposal problem could be worked out in time. *Id.* An NRC observer has noted that the interim rule promulgated by the agency after remand "resembled the overturned one very closely," and that the Commission's resources "would have been better spent in other endeavors, such as the ultimate solution to the waste management problem." Muntzing, *The Courts and Energy Policy*, at 16 (remarks before a conference sponsored by the National Legal Center for the Public Interest, 1977) (copy on file at the *Georgetown Law Journal*). The conflict between compliance with the court of appeals' remand order and pursuit of the ultimate solution to the waste management problem is not readily apparent. One may never know whether short term diversions in the form of environmental assessments may yet point the way toward a mobilization of resources that yields long term solutions. On the elusiveness of the ultimate solution, see U.S. DEP'T OF ENERGY, REPORT OF TASK FORCE FOR REVIEW OF NUCLEAR WASTE MANAGEMENT (1978) (DOE/ER-0004/D); Carter, *Nuclear Wastes: The Science of Geologic Disposal Seen as Weak*, 200 SCI. 1135 (1978); Carter, "Cooperative Federalism" Proposed for Siting Waste Repositories, 202 SCI. 501 (1978); La Porte, *Nuclear Waste: Increasing Scale and Socio-political Impacts*, 201 SCI. 22 (1978).

119. See generally Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA As a Case Study*, 64 CALIF. L. REV. 14 (1976); Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 NW. U.L. REV. 15 (1977); Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111 (1972); Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585 (1972); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972); Koch, *Discovery in Rulemaking*, 1977 DUKE L.J. 295; McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens*

ery in NEPA of a number of procedural commands not found in the APA.¹²⁰ And it is likely to encourage relaxation of the elaborate and healthy demands upon the agencies to explain and justify their judgments in detail.¹²¹ The agencies will invoke *Vermont Yankee* in defense of crabbed rationalizations of adopted rules. Not improbable is a spate of litigation over whether judicially ordered explanations or procedural exercises arguably beyond the APA minima are supportable nonetheless under expansive interpretations of the "arbitrary [and] capricious" standard or the "basis and purpose" requirement,¹²² an independent statute such as 28 U.S.C. § 2106,¹²³ or NEPA,¹²⁴ or even the dictates of procedural due process.¹²⁵ At worst, *Vermont Yankee*

in *EPA and OSHA*, 67 GEO. L.J. 729 (1979); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Whitney, *Technical and Scientific Evidence in Administrative Adjudication*, 45 U. CIN. L. REV. 37 (1976); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782 (1974).

120. The Supreme Court stated that "it is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA." 435 U.S. at 548. Others have found it not nearly so clear. See, e.g., W. RODGERS, *supra* note 1, § 7.3, at 717-25 (and cases cited therein); Anderson, *supra* note 87, at 314-20. Some courts hold that NEPA requires a cost-benefit analysis of agency action. E.g., *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1384 (2d Cir.) (NEPA requires cost-benefit analysis of major federal activities balancing costs and environmental effects), *cert. denied*, 434 U.S. 1064 (1977); *Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 516 F.2d 378, 386-87 (2d Cir. 1975) (same). This requirement of a cost-benefit analysis seems clearly to be a procedural requirement in NEPA, much like a detailed findings requirement, going well beyond the APA minima.

121. See notes 48-70 *supra* and accompanying text.

122. 5 U.S.C. § 553(c)(1976). For cases in which the courts have acknowledged the applicability of the APA but nevertheless seem to require more than the APA minimum, see *Appalachian Power Co. v. Train*, 566 F.2d 451, 456-57 (4th Cir. 1977) (EPA thermal regulations invalidated because reasonable availability of unpublished regulation did not meet APA requirements for actual notice or publication), *Fund for Animals v. Frizzell*, 530 F.2d 982, 988-90 (D.C. Cir. 1975) (*per curiam*) (in addition to explicit APA requirements, agency must give advance notice of possible changes in open season on certain migratory birds). For an example of on-the-record requirements in adjudication, see *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 879 (1st Cir. 1978) (in adjudication under APA decision could be based only on documents presented at or before public hearing).

123. See *Environmental Defense Fund, Inc. v. Costle*, 578 F.2d 337, 346 (D.C. Cir. 1978) (citing statute and requiring EPA to report on changes in drinking water standard based on new data). The statute states:

The Supreme Court, or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (1976).

124. See note 120 *supra*.

125. See *Taylor v. District Eng'r, Army Corps of Eng'rs*, 567 F.2d 1332, 1338-41 (5th Cir. 1978) (Corps' refusal to comply with its own regulations and agreements violated permittee's due process rights); *Shell Oil Co. v. FPC*, 520 F.2d 1061, 1075-76 (5th Cir.) (agency did not violate procedural due process when it afforded private parties an opportunity to make their case and to challenge Commission's evidence), *cert. denied*, 426 U.S. 941 (1975). See generally Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 28 n.1 (1976) (collecting authorities); Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89.

could soften the hard look and blunt the urgency of the new age of administrative responsibility.¹²⁶

The principal reason dire readings of *Vermont Yankee* are unlikely to be realized is that Congress, in recent statutes addressing technological policymaking, routinely has imposed procedures beyond the APA minima, and embraced a variety of procedural commands associated with the hard look doctrine. This trend preceded *Vermont Yankee*, and was influenced by a number of judicial decisions now of doubtful force because of *Vermont Yankee*. The legislation strongly approves, and strengthens, a variety of judicially initiated hard look innovations now commended to agencies by the Administrative Conference.¹²⁷ This demonstration of creative partnership between the courts and Congress in overseeing the administrative function might not have occurred had the Supreme Court insisted earlier on the preservation of a 1946 vintage of administrative regularity.

To mention only the prominent examples, the Clean Air Act Amendments of 1977 contain detailed provisions on the preparation of a record to enhance judicial review in notice and comment rulemaking.¹²⁸ This must be seen as a move to require "that an agency be judged on a single, comprehensive, detailed justification for its decision, prepared at the time when it promulgates a rule."¹²⁹ The Clean Water Act of 1977, in the section addressing promulgation of effluent standards for toxic pollutants, has elaborate public hearing provisions with limited rights of cross-examination similar to those suggested in *International Harvester*.¹³⁰ The Toxic Substances Control Act of 1976¹³¹ contains a number of procedural refinements on notice and comment rulemaking, including provisions for a detailed statement of basis and purpose, specifics on the conduct of hearings, a limited right of cross-examination, and the keeping of verbatim transcripts that become part of the

126. The Supreme Court's classic contribution to the hard look doctrine, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), for a variety of reasons has been treated harshly by commentators. E.g., Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 722-24, 762-70 (1975). This is not the occasion for a full scale defense of *Overton Park*, other than to note that this academic failure has enjoyed a stunning success in the real world. Between March 1971, when the case was decided, and December 1978, *Overton Park* has been cited in federal court opinions on more than 650 occasions.

127. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1976 REPORT 44-45 (1977) (recommending agency utilization of rulemaking procedures beyond the APA, including adjudicatory procedures, additional opportunities for public comment, and explanations of agency tests, procedures, and conclusions).

128. Pub. L. No. 95-95, § 305, 91 Stat. 772 (1977) (to be codified in 42 U.S.C. § 7607) (implementing in important particulars the recommendations of Pedersen, *supra* note 28, at 78-82).

129. Pedersen, *supra* note 28, at 73. Enthusiasm for on-the-record rulemaking when the agency acts in a classic legislative sense under section 553 of the APA is not universal. See Auerbach, *supra* note 119, at 61. Of course there will be a record prepared for purposes of judicial review, even if the agency must compile one on an ad hoc basis. See Pedersen, *supra*, at 63, 66-70; Wright, *Commentary: Rulemaking and Judicial Review*, 30 ADMIN. L. REV. 461, 464-65 (1978). Discovering the record, and supplementing what has been discovered, may call for a substantial judicial undertaking. The trial following remand in *Overton Park* lasted 25 days, an exercise aptly described as an example of "the 'hard look' doctrine in spades." Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974).

130. Pub. L. No. 95-217, § 53(a)(2), 91 Stat. 1589 (1977) (to be codified in 33 U.S.C. § 1317).

131. 15 U.S.C. §§ 2601-2629 (1976).

record on review.¹³² This statute also approves a remand on grounds condemned explicitly by *Vermont Yankee*.¹³³ Elsewhere, legislative endorsement of the hard look doctrine takes the form of a tightening of the standard of review,¹³⁴ mandatory consultation,¹³⁵ and elaborate findings requirements.¹³⁶ These provisions fulfill the same function of justification under the gun as does the hard look case law.¹³⁷ The findings requirements, moreover, provide the basis for a sharpened substantive judicial review. Several of these findings provisions obviously bear the stamp of NEPA's impact statements.¹³⁸ Within certain defined areas, they subject the agency to the liability of litigation now routine under environmental impact statements.

This wholesale assault by Congress, in a word, has transformed the agencies into suspect legislators. Rulemaking under constraint of the hybrid procedures has become not the exception but the norm. The agencies are no longer trusted with the free-wheeling, answerable-to-none, brainstorming function that is at the heart of the classic legislative model of rulemaking.¹³⁹ Failures of performance, the recurrence of bias and sloth, and other agency weaknesses have taken a toll. Protected on the flank by a dormant delegation doctrine, administrative authority is succumbing nonetheless to a piecemeal congressional war of attrition that adds up to a repudiation of the authority of the agencies to legislate without a record by means of their choosing.¹⁴⁰ While

132. *Id.* § 2605(c). This section of the Act closely follows the Federal Trade Commission Act Amendments of 1976, 15 U.S.C. § 57a-57c (1976). See Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679 (1976). Both of these statutes have been described recently as representing new maxima in the procedural baggage of rulemakings. Fuchs, *Development and Diversification in Administrative Rule Making*, 72 NW. U.L. REV. 83, 104 (1977).

133. A remand is in order if administrative limitations upon the right of cross-examination are found to have precluded "disclosure of disputed material facts . . . necessary to a fair determination" by the Administrator. 15 U.S.C. § 2618(c)(1)(B)(ii) (1976); cf. *id.* § 57a(e)(3) (similar standard for judicial review of FTC rulemaking proceedings).

134. See 29 U.S.C. 655(f) (1976) (Occupational Safety and Health Act) (findings of Secretary conclusive if supported by substantial evidence in record), interpreted in *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974) (substantial evidence standard requires careful identification by Secretary of reasons for his decision whether supported by facts in record or judgment and policy).

135. See 49 U.S.C. § 1712(f) (1970) (Airport and Airway Development Act) (requires airport planners to consult with HEW, Department of Agriculture, and Council on Environmental Quality concerning environmental effects of airport plans).

136. See, e.g., 7 U.S.C. § 136d(b) (1976) (requires economic impact analysis of proposed changes in classifications of certain pesticides); 16 U.S.C. § 1455(e) (1976) (lists findings required before approval of a state coastal zone management program); 30 U.S.C. § 201 (a)(3)(c) (1976) (requires evaluation of effects prior to issuance of a federal coal lease); 42 U.S.C. § 5904(a)(5) (1976) (requires net energy analysis of proposals for funding under Federal Non-Nuclear Energy Research and Development Act of 1974); 42 U.S.C. § 6295(a)(4)(C), (D) (1976) (requires cost-benefit analysis in connection with establishment of an energy efficiency standard); Surface Mining Control and Reclamation Act, Pub. L. No. 95-87, § 522(d), 91 Stat. 445 (1977) (to be codified in 30 U.S.C. § 1272) (requires economic, environmental, and coal supply analysis before any land is designated unsuitable for surface coal mining).

137. See notes 48-70 *supra* and accompanying text.

138. See, e.g., 7 U.S.C. § 136w(d) (1976).

139. See *Townsend v. Yeomans*, 301 U.S. 441, 451-52 (1937) (state legislature not required to make inquiries before taking action); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973) (agency may make rules within its statutory authority), *cert. denied*, 415 U.S. 951 (1974).

140. A generic legislative overhauling of the APA was proposed by Senator Ribicoff and others in the 95th Congress. S. 2490, 95th Cong., 2d Sess., 124 CONG. REC. S1196-1207 (daily ed. Feb. 6, 1978). By

purists will grumble about this erosion of executive authority, pragmatists will recognize the loss as a reasonable price to pay for an injection of discipline into agency decisionmaking.

In its literal insistence upon the APA "minima," *Vermont Yankee* is a day late and a dollar short. The ruling was a relic the day it was handed down.

III. BALLS AND STRIKES: THE AGENCIES' OBLIGATION TO CONSIDER ALTERNATIVES WITHOUT REGARD TO THE INITIATIVE OF THE PARTIES

A third aspect of *Vermont Yankee* of special concern to public interest intervenors is its impact upon what I will call the balls and strikes doctrine. This concept traces its contemporary birth to the famous opinion of Judge Paul Hays and the less well known observations of Federal Power Commissioner Charles Ross,¹⁴¹ in *Scenic Hudson (I)*.¹⁴² In holding that the Commission failed to consider alternatives and measures to minimize effects from a pumped storage project planned for the Hudson River, Judge Hays wrote:

[T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.¹⁴³

The umpire metaphor was picked up and repeated by Judge Skelly Wright in his powerful *Calvert Cliffs*' opinion,¹⁴⁴ which took the Atomic Energy Commission to task for omitting from hearings environmental issues not raised by the parties.¹⁴⁵

approving modified procedures for on-the-record hearings, the bill eschewed the trend toward the formalization of informal rulemakings while endorsing the concept of hybrid procedures. Section-by-section analysis of S. 2490, 124 CONG. REC. S1202 (quoting *American Public Gas Ass'n v. FPC* (The Second Nat'l Natural Gas Rate Cases), 567 F.2d 1016, 1067 (D.C. Cir. 1977)). Representatives of the organized bar, predictably, are less than enthusiastic about the limited right to trial-type procedures contained in the bill. Report of the Comm. on Revision of the Administrative Procedure Act to the Council of the [American Bar Association] Section on Administrative Law on S.2490, *passim* (Sept. 8, 1978) (unpublished report on file at the *Georgetown Law Journal*). Administration proposals to modify nuclear licensing proceedings by curtailing adjudicatory procedures have been opposed on similar grounds by segments of the organized bar. See H.R. 11704, 95th Cong., 2d Sess., 123 CONG. REC. H2298 (daily ed. Mar. 21, 1978); S.2775, 95th Cong., 2d Sess., 123 CONG. REC. S4259 (daily ed. Mar. 21, 1978); Report and Resolution of the Environmental Quality Control Committee, Section on Administrative Law, American Bar Association, *passim* (1978).

141. *Consolidated Edison Co., Project No. 2338*, 33 F.P.C. 428, 458, 463 (1965) (Ross, C., concurring in part and dissenting in part) (agency on its own motion must make sure that a full record is presented and that all alternatives are considered).

142. *Scenic Hudson Preservation Conference v. FPC (I)*, 354 F.2d 608, 620 (2d Cir. 1965) (order set aside because FPC failed to compile sufficient record to support its decision and failed to make thorough study of alternatives), *cert. denied*, 384 U.S. 941 (1966).

143. *Id.* at 620.

144. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

145. *Id.* at 1119. The court stated:

The primary responsibility for fulfilling [NEPA's] mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must make itself take the initiative of considering environmental

Repudiation of the agency-as-umpire model has important implications on at least three levels. One is that each agency must accept environmental protection as part of its organic mandate. This is a basic teaching of NEPA,¹⁴⁶ and is largely unaffected by *Vermont Yankee*.¹⁴⁷ Whether this environmental mandate gives way before other concerns is a statutory matter with NEPA succumbing only in the event of a clear conflict.¹⁴⁸

Two other important implications of the *Scenic Hudson-Calvert Cliffs*' balls-and-strikes doctrine are put in jeopardy by *Vermont Yankee*. One is the notion that the environmental umbrella somehow exempts the parties from the normal obligations of the adversary process; these matters must receive active and affirmative protection by the agency regardless of the posture of the parties. The second, closely related to the first, is that environmental issues, not unlike civil liberties,¹⁴⁹ have a preferred status¹⁵⁰ deserving a "special claim" to judicial protection.¹⁵¹ Consistently with this status, a sizeable number of cases, often with explicit reliance upon *Scenic Hudson* or *Calvert Cliffs*, have excused environmental advocates from certain universal hazards such as laches,¹⁵² waiver,¹⁵³ exhaustion of administrative remedies,¹⁵⁴ specifications of objections with precision,¹⁵⁵ and proof of the usual indicia of equitable relief.¹⁵⁶

The broadest implications of the balls-and-strikes doctrine are revolutionary. Once the agency abandons its role as umpire, it takes on all the functions

values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.

Id. (footnotes omitted) (citing, among other cases, *Scenic Hudson*).

146. See W. RODGERS, *supra* note 1, § 7.1, at 699-701.

147. 435 U.S. at 553 ("NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.").

148. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976).

149. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

150. Compare Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 265-67 (1974) (environmental policy should be based on Constitution because it is aimed at preserving symbols of American culture) with Tribe, *From Environmental Foundations to Constitutional Structures: Learning From Nature's Future*, 84 YALE L.J. 545 (1974) (criticizing Sagoff's proposed substantive protection for environmental policy and advocating instead emphasis on procedures).

151. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971) (fundamental interests in life, health, and liberty have special claim to judicial protection).

152. See, e.g., *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 868-69 (5th Cir. 1975) (laches does not apply because defendants did not show high level of prejudice required when environment is involved); *Lathan v. Brinegar (II)*, 506 F.2d 677, 692 (9th Cir. 1974) (laches not applied because issue important to public and plaintiff did not show "extreme lack of diligence" in raising issue); *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164, 1182 (6th Cir. 1972) (delay not unreasonable because citizens were entitled to assume that TVA would comply with NEPA). But see note 185 *infra* and accompanying text.

153. See *United States v. 18.2 Acres of Land*, 442 F. Supp. 800, 803-05 (E.D. Cal. 1977) (technical violation of rule held not to constitute waiver in light of broad mandate of NEPA).

154. *Jette v. Bergland*, 579 F.2d 59, 64 (10th Cir. 1978) (full exhaustion of administrative remedies not required for plaintiff seeking to require agency to prepare EIS; agency cannot follow procedure that allows it to avoid preparation of impact statement). But see note 186 and accompanying text.

155. Cf. I-291 Why? Ass'n v. Burns, 517 F.2d 1077, 1081 (2d Cir. 1975) (per curiam) (general claim that state violated NEPA and breached responsibility to public upheld because state's figures in its own EIS found by court to be contradictory). But see note 183 *infra* and accompanying text.

156. See W. RODGERS, *supra* note 1, § 7.10, at 798-99.

of the players.¹⁵⁷ The staff is supposed to ferret out issues that have not occurred to the parties. There may be room for the presentation of more than one staff position, or perhaps separate funding of intervenors to assure satisfactory ventilation of their points of view.¹⁵⁸ The active and affirmative protection of environmental interests would seem to oblige staff counsel to disclose latent weaknesses in the agency case, produce useful documents not requested, and identify helpful experts within the agency even if they are hostile to the staff position. All this is entirely alien to traditional advocacy, particularly in the adjudicatory setting. And despite an occasional exception,¹⁵⁹ any attorney with any experience in environmental litigation will tell you that the agencies are not noted for excessive procedural generosity to intervenors.

Vermont Yankee assures that procedural beneficence resulting from agencies giving active and affirmative protection to the public interest in the environment will not get out of hand. The court of appeals, invoking the umpire metaphor,¹⁶⁰ concluded that when an intervenor's comments "bring 'sufficient attention to the issue to stimulate the Commission's consideration of it,' " the Commission must "undertake its own preliminary investigation of the proffered alternative sufficient to reach a rational judgment whether it is worthy of detailed consideration in the EIS . . . [and] must explain the basis for each conclusion that further consideration of a suggested alternative is unwarranted."¹⁶¹ The court of appeals, which saw the energy conservation alternative as having been "forcefully pointed out" by the citizens' group in its comments on the draft environmental impact statement,¹⁶² concluded that the Commission's threshold test demanded more and thus placed unacceptably "heavy substantive burdens on intervenors."¹⁶³

Strongly disagreeing, the Supreme Court held that the energy conservation alternative did not have to be addressed because the intervenors did not raise their objections with sufficient support and precision.¹⁶⁴ The Court was critical of the intervenor's procedural moves, hinting that matters were raised in the abstract only to lay the groundwork for a subsequent judicial attack.¹⁶⁵ The Court repudiated the "heavy substantive burden" label, and endorsed the Commission's threshold test requiring a sufficient showing "to require

157. The effect is to shift the burden to the agency staff to address fully all issues raised, come forward with relevant documentation from its files, and produce witnesses. *Id.* § 1.5, at 21.

158. Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815 (1975) (discussing proposals and concluding that agencies have residual powers to sponsor presentation of opposing views that would otherwise not be heard).

159. See 41 Fed. Reg. 50,829 (1976) (proposing financial assistance to intervenors in proceeding to determine authorization of widespread commercial use of mixed oxide fuel, despite general policy not to assist intervenors).

160. *Aeschliman v. NRC*, 547 F.2d 622, 627 (D.C. Cir. 1976).

161. *Id.* at 628 (quoting *Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 339 (1974), *cert. denied*, 420 U.S. 946 (1975)).

162. *Id.* at 625.

163. *Id.* at 627 n.11.

164. 435 U.S. at 554.

165. *Id.* at 553-54 ("[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.' ").

reasonable minds to inquire further.”¹⁶⁶ Although the Court gave lip service to the agencies’ obligations under NEPA—which include the obligation to consider alternatives¹⁶⁷—*Vermont Yankee* puts the burden on intervenors to demonstrate that an alternative is reasonably available before it must be investigated and weighed by the agency.¹⁶⁸ This new burden does not mean much in the obvious cases where an alternative is plainly credible, such as a coal-burning facility instead of a nuclear power plant, or in cases where an alternative is plainly incredible, such as birth control in lieu of a new housing project. It means a great deal, however, in the case of arguable or partial alternatives, such as energy conservation, which is within a reasonable, albeit ambitious, range of policy options.¹⁶⁹ These alternatives cause the greatest difficulty within an agency.¹⁷⁰ They are normally beyond the reach of—or even alien to—the agency’s primary mission. Staffing capability, experience, predilection, and bias all conspire against in-depth investigations of these alternatives. NEPA was intended to overcome just this type of institutional onesidedness.¹⁷¹ And the difficulties for the agency investigating marginal alternatives are magnified many times for intervenors who usually work with limited resources.¹⁷²

Vermont Yankee’s qualification of the balls-and-strikes doctrine and its narrowing of NEPA stem not so much from the statement of the burden but from the context in which the statement is made. The Court’s adoption of the Commission’s definition of the intervenors’ burden and its quotation from *Portland Cement Association*¹⁷³ can be read as merely hard look standard

166. *Id.* at 554 (quoting *In re Consumers Power Co.*, 7 A.E.C. 19, 32 n.27 (1974)).

167. 42 U.S.C. § 4335(c)(iii) (1976).

168. 435 U.S. at 553 (“While it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors’ position and contentions.”).

169. See Mueller, Energy Conservation Alternatives to Nuclear Power, A Case Study, National Aeronautics & Space Administration Doc. No. X-73-205 (July 1973) (Goddard Space Flight Center). Consideration of the energy conservation alternative, for example, might result in a reduction of units at a given site.

170. Another example would be that of a dam-building agency considering nonstructural alternatives such as floodplain zoning.

171. See SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. NO. 296, 91st Cong., 1st Sess. 14, 19-20 (1969) (NEPA intended to overcome institutional constraints preventing agencies from considering environmental concerns). See also Hill & Ortolano, *NEPA’s Effect on the Consideration of Alternatives: A Crucial Test*, 18 NAT. RES. J. 285, 308-11 (1978) (concluding that NEPA has done little to overcome agency bias).

172. Agency assistance to intervenors is modest. See, e.g., *Greene County Planning Bd. v. FPC* (IV), 559 F.2d 1227, 1238 (2d Cir. 1976) (en banc) (denying fees to intervenors); 41 Fed. Reg. 50,829 (1976) (announcing decision not to provide financial assistance to NRC intervenors generally, but proposing assistance in one pending case).

173. 435 U.S. at 533. The Court stated:

“[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results”

Id. (quoting *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974)).

fare—namely, the agency is obliged to respond only to serious concerns and not frivolous hypotheticals.¹⁷⁴ Energy conservation, however, does not at first blush appear so silly a notion that it can be written off as incapable of reducing the need for nuclear units.¹⁷⁵ It is difficult, for example, to place energy conservation on the same plane of frivolity as the unsupported claim of sampling error posited in *Portland Cement*.¹⁷⁶ *Vermont Yankee* does not flatly deny this, as the decision rests equally upon the apparent unreasonableness of the alternative at the time it was advanced and the failure of the intervenors to demonstrate otherwise.¹⁷⁷ *Vermont Yankee*, unfortunately, does support an argument that in a sizable category of “colorable,”¹⁷⁸ partial, or arguable alternatives, the agency can sit back like an umpire, blind and fat, refusing to look into the matter itself and faulting the litigants before it for not curing this homegrown myopia. *Vermont Yankee* thus advises the courts to defer to the agencies on the content of the EIS and on the selection of procedural hurdles that must be cleared by those who would expand this content.¹⁷⁹

In its insistence that parties litigating environmental issues not be given the benefit of a procedural doubt, *Vermont Yankee* also discourages the view that environmental matters are so fundamental as to be entitled to a special claim to judicial protection.¹⁸⁰ The lower federal courts had been of two minds on the matter, with one line of authority embracing the idea,¹⁸¹ another rejecting it.¹⁸² Even before *Vermont Yankee*, courts increasingly balked at the notion that they ought to excuse sloppy lawyering under the banner of environmen-

174. E.g., *Cumington Preservation Comm'n v. FAA*, 524 F.2d 241, 244 (1st Cir. 1975) (EIS need discuss only reasonable alternatives); *Environmental Defense Fund, Inc. v. Corps of Engr's (Tennessee-Tombigbee)*, 492 F.2d 1123, 1135-36 (5th Cir. 1974) (technically and economically speculative transportation alternative inappropriate for consideration in EIS on waterway project); *Life of the Land v. Brinegar*, 485 F.2d 460, 471-72 (9th Cir. 1973) (EIS need not consider alternative when its effect cannot be reasonably ascertained and its implementation is remote and speculative), *cert. denied*, 416 U.S. 961 (1974); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (Congress did not intend that agencies consider remote alternatives, such as alternatives dependent on repeal of antitrust laws).

175. Prior to *Vermont Yankee*, the energy conservation alternative had been considered in many impact statements and required by several judicial decisions. See *North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir.), *vacated and remanded on other grounds*, 429 U.S. 891 (1976); *Cedar-Riverside Environmental Defense Fund v. Hills*, 422 F. Supp. 294, 313-15 (D. Minn. 1976); cf. *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 203, 139 Cal. Rptr. 396, 408 (1977) (state law requires consideration of water conservation alternative to groundwater extraction plans); 1977 Conn. Pub. Acts No. 77-514, § 2(b)(7) (to be codified in CONN. GEN. STAT. § 22a-16(b)(7)) (EIS must address “the effect of the proposed action on the use and conservation of energy resources”).

176. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

177. 435 U.S. at 552-54.

178. The characterization is that of the court of appeals. *Aeschliman v. NRC*, 547 F.2d 622, 628 (D.C. Cir. 1976).

179. See 435 U.S. at 552-55 (concept of alternatives is an evolving one, so court should judge agency's decision in light of information originally available to agency); cf. *Kleppe v. Sierra Club*, 427 U.S. 390, 405-06 (1976) (counseling similar deference on statement timing).

180. See notes 150-51 *supra* and accompanying text.

181. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971); cf. *Certified Color Mfrs. Ass'n v. Matthews*, 543 F.2d 284, 297 (D.C. Cir. 1976) (lower standard of proof required when important health interests at stake).

182. *Accord*, *Aberdeen & R. R.R. v. SCRAP (I)*, 409 U.S. 1207, 1217-18 (1972) (Burger, C.J., Circuit Justice); see notes 183-86 *infra* and accompanying text.

tal right, or create a new jurisprudence applicable to environmental cases only. This trend is reflected in recent opinions withholding the hard look from issues not raised with specificity below,¹⁸³ refusing broad injunctive relief despite EIS deficiencies,¹⁸⁴ and reviving concepts of laches¹⁸⁵ and exhaustion of administrative remedies¹⁸⁶ in environmental cases.

It always has been true that the intensity of the judicial hard look rewards the ingenuity and force of the presentations of the parties before the agencies.¹⁸⁷ *Vermont Yankee* says as much insofar as the discussion of alternatives in the EIS is concerned.¹⁸⁸ But acceptance of the view that skill and competence are amply rewarded does not undermine the special entitlement of environmental claims to judicial protection. This status has origins deep in the common law,¹⁸⁹ and finds expression in contemporary administrative law addressing issues of health and safety.¹⁹⁰ The rapid evolution of the hard look or close scrutiny doctrine has occurred mostly in environmental and natural resource cases,¹⁹¹ and for reasons quite understandable. Agency decisions reallocating uses of valuable natural resources, affecting the health of the population, and channeling the direction of future technologies are remorseless in result, and deserving of the hard look before the long leap.¹⁹²

183. See *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 523 (5th Cir. 1978) (failure of Air Force to comply with its own regulations could not be considered on appeal because not raised below); *North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir.) (issue not raised with sufficient specificity below), *vacated and remanded on other grounds*, 429 U.S. 891 (1976).

184. See *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978) (minor EIS deficiency must be balanced against public interest; not every EIS deficiency calls for injunctive relief); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 457-58 (D.C. Cir. 1977) (failure to file EIS on time did not warrant injunctive relief when final EIS filed before construction was begun); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 831 (D.C. Cir. 1976) (deficiencies in EIS for submarine base did not warrant delay in construction when delay might injure national defense and deficiencies are remediable during construction).

185. *Sworob v. Harris*, 451 F. Supp. 96, 101-02 (E.D. Pa. 1978) (action to enjoin further construction of townhouse project until EIS prepared barred by laches because plaintiffs waited eight years to file suit and delay prejudiced defendant); *Sierra Club v. Cavanaugh*, 447 F. Supp. 427, 429-30 (D.S.D. 1978) (action to enjoin further construction of and hookup to rural water system until EIS prepared barred by laches because delay in bringing suit was inexcusable and prejudicial to defendants); *Wioda v. United States*, 446 F. Supp. 1377, 1390-91 (D. Minn. 1978) (when plaintiffs waited to file suit until after alleged deficient final EIS was issued, route of high voltage transmission line designated, right-of-way acquired, and construction commenced, action barred by laches); *Organizations United for Ecology v. Bell*, 446 F. Supp. 535, 544-53 (M.D. Pa. 1978) (action to enjoin construction and use of solid waste landfill at federal prison camp until EIS prepared barred by laches because plaintiffs waited three years to file suit, delay in bringing action was inexcusable, and prejudice to public interest by delay outweighed any prejudice caused by operation of the landfill).

186. See *Sierra Club v. ICC*, 1978 Fed. Carr. Cas. ¶ 82,768, at 57,813-14 (D.C. Cir. 1978) (Leventhal, J., dissenting) (objections to EIS should not be considered when they were not presented to agency).

187. See notes 68-70 *supra* and accompanying text.

188. 435 U.S. at 553.

189. See W. RODGERS, *supra* note 1, § 2.16 (discussing common law public trust doctrine, which deems certain natural resources to be held in trust for public); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (same).

190. See *Certified Color Mfrs. Ass'n v. Matthews*, 543 F.2d 284, 297 (D.C. Cir. 1976) (lower standard of proof required when important health interests at stake); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971) (personal interests in life, health, and liberty have always had special claim to protection).

191. See notes 48-70 *supra* and accompanying text.

192. Professor Breyer opposes hard look review in nuclear licensing cases on the ground that the act of licensing "is no more likely to injure health or the environment than failure" to license. Breyer, *supra* note

The special status of environmental issues stems also from the recognition that the public interest in them is often diffuse, abstract, and poorly represented.¹⁹³ Ultimately, the preferred status of environmental claims is fixed by NEPA, which, even in hostile hands, must be read as laying down a procedural agenda that profoundly modifies federal agency decisionmaking.¹⁹⁴

IV. THE SCOPE OF ALTERNATIVES PROPERLY ADDRESSED IN THE IMPACT STATEMENT

As with its impact on the balls-and-strikes doctrine, *Vermont Yankee's* effect on the scope of alternatives addressed in the EIS stems not so much from the formulation adopted as the occasion for its announcement. The Supreme Court embraces as its own¹⁹⁵ the rule of reason test of *Natural Resources Defense Council, Inc. (NRDC) v. Morton*.¹⁹⁶ That is, the EIS need not address every alternative "thought conceivable by the mind of man"¹⁹⁷ but only those realistically available within the time frame of the proposal being advanced.

The great strength of this test—its flexibility—is also its greatest weakness as a vehicle for judicial enforcement of rigorous agency decisions. *Vermont Yankee* identifies one vulnerability by affirming a threshold burden requirement that can be applied to excuse agency consideration of colorable, or partial, alternatives.¹⁹⁸ Another vulnerability, also picked up by the Supreme Court, is that the "alternatives" that must be addressed in the EIS are ill-

1, at 1835. Surely the standard of review is not to be dictated by a preliminary determination of whether health and safety claims have merit. Even if one accepts Professor Breyer's premise that the nuclear energy alternative is generally preferable to coal, *id.* at 1835-38, close scrutiny is still in order to assure that adverse effects are minimized and extraordinary risks exposed. See *North Anna Environmental Coalition v. NRC*, 533 F.2d 655 (D.C. Cir. 1976) (siting of nuclear reactors astride geological faults reviewed and upheld). Congress has given the administrator freedom to assess the complex issues relating to the development of nuclear power through the broadly written licensing provisions of the Atomic Energy Act, 42 U.S.C. § 2232 (1976), but the Nuclear Regulatory Commission is not excused from the now familiar demands of hard look judicial review. Professor Breyer's further suggestion that any remand in *Vermont Yankee* represents an unusually stringent application of the hard look, *id.* at 1833, 1840-41, slights the expansive reach of the doctrine. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir.) (searching and careful review required of agency action, and agency must disclose its thinking in detail before adopting rules), *cert. denied*, 434 U.S. 829 (1977); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975) (same); notes 49-76 *supra* and accompanying text.

193. Cf. *Sierra Club v. Morton*, 405 U.S. 727, 738-400 (1972) (only those directly injured as users have standing to seek review of agency action affecting environment). The problem of underrepresentation is aggravated by the decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269-71 (1975) (reading narrowly the circumstances in which attorney's fees may be rewarded in private litigation). See generally Stewart, *supra* note 19, at 1713-16, 1756-1813 (critically analyzing problem of adequate representation for all interests affected by agency decision).

194. See *Lathan v. Brinegar (II)*, 506 F.2d 677, 693 (9th Cir. 1974) (the "history of environment" may well prove to be "the history of observance of procedural safeguards") (quoting *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.)). See generally W. RODGERS, *supra* note 1, §§ 7.1, 7.3 (reviewing scope and effect of NEPA).

195. 435 U.S. at 511.

196. 458 F.2d 827, 837-38 (D.C. Cir. 1972).

197. 435 U.S. at 551.

198. See notes 177-79 *supra* and accompanying text.

defined and "evolving," so there is justification for the courts to defer to the agencies' choice of options addressed in the impact statement.¹⁹⁹ So read, one can conceive of invoking the *NRDC v. Morton* rule of reason test to excuse an administrator from addressing each and every alternative required to be addressed by the *NRDC v. Morton* opinion itself.²⁰⁰

Another difficulty with *Vermont Yankee*'s understanding of NEPA alternatives is that they are perceived as purely factual matters, subject to the assignment of burdens and the recognition that a licensing board's decisions must be judged by the information then available to it.²⁰¹ In the case at hand, information available to the licensing board in the early 1970's included precious little about energy conservation. There is thus force in the suggestion that the flaw in the court of appeals' approach in *Vermont Yankee* was not in taking a hard look but in taking it from the perspective of Monday morning. The question, however, is not whether the intervenors, the staff, or the board are at fault for failing to address in depth what experience was yet to reveal. It is whether the Court finds reason for administrative reconsideration at the time it decides on the law then applicable.²⁰² Judicial enforcement of a constant administrative attention to the issue of facility need seems hardly out of place, in light of NEPA's studied emphasis upon alternatives. This is especially true if the question of alternatives is strictly a legal matter, which it might very well be.²⁰³

A partial answer to *Vermont Yankee*'s determination to defer to the agencies' perception of a workable alternative and the extent to which it will be addressed is that NEPA itself mandates an in-depth assessment. The EIS must be "detailed" in its discussion,²⁰⁴ and the agency is obliged to "study, develop and describe" appropriate alternatives.²⁰⁵ While not self-defining, the concept of "alternative" is not without meaning, particularly in the context of a concrete proposal. It includes, among other things, doing nothing,²⁰⁶ doing

199. 435 U.S. at 552-53.

200. The action proposed in that case was the leasing of tracts for offshore oil and gas development, and the alternatives included executive elimination of oil import quotas, increased onshore exploration and development, increased nuclear development, changes in FPC natural gas pricing and state prorationing, but not the development of more speculative energy sources (such as geothermal and coal gasification). 458 F.2d at 829-30, 833-38.

201. 435 U.S. at 553.

202. *Cort v. Ash*, 422 U.S. 66, 77 (1975) (changes of law apply to pending cases); see *Environmental Defense Fund, Inc. v. Costle*, 578 F.2d 337, 346 (D.C. Cir. 1978) (court "cannot wear blinders in a litigation involving an ongoing administrative process, and its rulings and relief must take account of the world as it exists as of the time of the decree").

203. The fact-law distinction, to be sure, is one of the most treacherous in administrative law. See, e.g., *Hanly v. Kleindienst* (II), 471 F.2d 823, 828-30 (2d Cir. 1972) (discussing the scope of review of the NEPA threshold question of whether an action is one "significantly affecting the quality of the human environment"), *cert. denied*, 412 U.S. 908 (1973). The intensity of judicial review, in the context of major facility construction, is likely to be influenced by the practical question of the extent of construction allowed during the pendency of review proceedings.

204. 42 U.S.C. § 1332(2)(C) (1976).

205. *Id.* § 1332(2)(E).

206. See, e.g., *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 698 (2d Cir. 1972) (abandonment of project must be considered as alternative); *Natural Resources Defense Council, Inc. v. Hughes*, 451 F. Supp. 1245, 1264 (D.D.C. 1978) (alternative of doing nothing unavailable); cf. *Alaska v. Andrus*, 580 F.2d 465, 472 (D.C. Cir. 1978) (alternative of delay must be considered).

something on a less bold scale,²⁰⁷ and doing it in a way that minimizes adverse effects.²⁰⁸ If the definition of "alternative" under NEPA also is a legal issue, it means that a court under the APA has full authority to review the agency refusal to consider proposed alternatives.²⁰⁹ The argument that the agency expertise ought to inform the content of the legal term²¹⁰ breaks down in the NEPA context when the agency may be both inexperienced in, and hostile to, the environmental considerations.²¹¹ The NRC's views on energy conservation ought to carry as much weight with the courts as, let us say, the ICC's assessment of fusion power.

Vermont Yankee asserts that the question of the need for Consumers Power's nuclear plant is assigned initially to state public utility commissions, with the NRC functioning primarily in the area of public health and safety.²¹² The Court then states that the obligation to consider alternatives under NEPA "has altered slightly the statutory balance"²¹³—a clearly disparaging view of NEPA's unvarnished invitation to conclude there is no need. This is a judicial judgment reflecting a deference to the agency choice of burdens and sense of significance; it is not a legislative direction that compels the conclusion that the "statutory balance" of the Atomic Energy Act of 1954 is not much affected by the National Environmental Policy Act of 1970.

There is no more important aspect of NEPA than the obligation to discuss the alternatives of no action, of lesser action, and of an action with mitigation. Any court-ordered change in the agency course, through substantive review whether under NEPA or a complementary statute,²¹⁴ is utterly dependent upon the depth of assessment of these other ways of doing things. *Vermont Yankee* announces no change in the accepted obligation to address real and workable alternatives. But the agencies, never enthusiastic about writing self-destruct mechanisms into their own proposals, will be quick to detect in the decision a softening of the judicial oversight that makes the obligation to evaluate the unthinkable a real one.

CONCLUSION

It is easy enough to overreact to *Vermont Yankee*. The decision, after all, confirms a variety of accepted legal propositions—the procedural dominance

207. See, e.g., *Farwell v. Brinegar*, 3 *Envir. Rep. Cas.* 20,881, 20,885 (W.D. Wis. 1973) (upgrading existing road must be considered as alternative to building new road).

208. See, e.g., *Simmans v. Grant*, 370 F. Supp. 5, 18 (S.D. Tex. 1974) (mitigation measures must be considered in EIS). See generally Note, *supra* note 87 (arguing that NEPA requires agencies to adopt the least adverse alternative).

209. 5 U.S.C. § 706(2) (C), (D) (1976).

210. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944); cf. *Train v. Natural Resource Defense Council, Inc.*, 421 U.S. 60, 87 (1975) (EPA's interpretation of environmental statute given weight).

211. See Leventhal, *supra* note 129, at 523 (court should be skeptical and insist on justification of agency position when nonenvironmental agency downplays environmental consequences of its actions).

212. 435 U.S. at 519, 550; see 42 U.S.C. § 2021(K) (1976) (federal preemption of state laws limited to protection against radiation hazard).

213. 435 U.S. at 551.

214. See W. RODGERS, *supra* note 1, § 7.12 (substantive review under NEPA and complementary statute); notes 81-102 *supra* and accompanying text (substantive review under NEPA).

of NEPA, congressional authority over agency procedures, the definitions of the intervenors' threshold burden and of the scope of alternatives that must be addressed in the impact statement. The decision is out of step, nonetheless, with the dominant strains of the close scrutiny doctrine that has become synonymous with contemporary judicial review of technological decision-making by the agencies. For this reason, *Vermont Yankee* is likely to be isolated and confined; the banishment of the decision should not be greatly mourned.

